UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

UNITED STATES OF AMERICA	*	
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V	*	
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TERRY VAN MEAD	*	CRIMINAL FILE NO. 11-87

SENTENCING
Monday, June 11, 2012
Burlington, Vermont

BEFORE:

THE HONORABLE WILLIAM K. SESSIONS III
District Judge

APPEARANCES:

CHRISTINA NOLAN, ESQ., Assistant United States Attorney, Federal Building, Burlington, Vermont; Attorney for the United States

STEVEN L. BARTH, Assistant Federal Public Defender, Office of the Federal Public Defender, District of Vermont, 126 College Street, Suite 410, Burlington, Vermont; Attorney for the Defendant

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MONDAY, JUNE 11, 2012

(The following was held in open court at 10:05 a.m.)

COURTROOM DEPUTY: This is case number 11-87, United States of America versus Terry Van Mead. The government is present through Assistant United States Attorney Christina Nolan. The defendant is present in the courtroom with his attorney, Steven Barth.

The matter before the Court is sentencing.

THE COURT: Okay. Mr. Barth, have you received a copy of the presentence report?

MR. BARTH: I have, your Honor.

THE COURT: And you have gone over that with your client?

MR. BARTH: I have, your Honor.

THE COURT: And any factual mistakes in the report?

MR. BARTH: None that we have not addressed in the drafting process, your Honor.

THE COURT: Okay. All right. Mr. Van Mead, have you read the report?

THE DEFENDANT: Have I read it before? Yeah, I have read it.

THE COURT: Have you gone over the report with Mr. Barth?

THE DEFENDANT: Yes, I have.

THE COURT: Are there any factual mistakes in the report?

THE DEFENDANT: None that we haven't addressed.

THE COURT: Okay. Have the government any factual errors?

MS. NOLAN: No, your Honor.

THE COURT: All right. I have read the presentence report. I have read the sentencing memoranda of both the government and the defense. There are a number of guideline application issues.

Defense ready to proceed to address those guideline application issues at this point?

MR. BARTH: Your Honor, counsel is prepared to proceed. However, as I indicated in an e-mail to you/Ms. Evelti, my client has a request to continue his sentencing hearing.

THE COURT: He has a request to continue the sentencing hearing?

MR. BARTH: This hearing, yes.

THE COURT: Okay. All right. Mr. Van Mead, do you want to let me know why you are wishing to continue the hearing? And what -- what you're seeking at this point?

MR. BARTH: Your Honor, I will address the

Court on behalf of my client.

My client is seeking a continuance because there was an incident at the Essex County jail. I do not know if the Court has been made aware of this incident through probation or not. However, my client is concerned that in the future, he may be charged with that crime if it is deemed a crime by the powers that be. And he is concerned that if he is sentenced here today, then some day down the road, perhaps the district attorney's office for the Essex -- for Essex County or perhaps the U.S. Attorney's Office in that district will choose to charge him and he will get additional time in custody.

He would have a preference to know whether he is going to be charged prior to a sentencing hearing.

THE COURT: Well, I don't know of the incident, so tell me what this is about.

MR. BARTH: There was, as I understand it, an incident, an altercation at Essex County including my client and possibly two correctional officers.

THE COURT: And how long ago was this?

MR. BARTH: It was about three and a half weeks ago.

THE COURT: Well, I -- I'm shocked at, you know, what you are asking here. I mean, who knows

when a -- that decision is going to be made. And, frankly, the sentence here I cannot imagine would have impact one way or another over a decision to be made by a state's attorney in New York State.

MR. BARTH: And, your Honor, in the brief time before court, I have addressed those issues with my client. There's been some inability to communicate that prior to the sentencing hearing today. So certainly there's a statute of limitations which would apply and give the state's attorney or district court a period of years to charge the crime. Certainly if it were a federal matter, it would be a five-year, I believe, statute of limitations, and I am guessing this Court is not prepared to continue the sentencing for that.

THE COURT: I mean, that's correct. So what does -- what does Mr. Van Mead wish to do at this point? I am not going to continue the sentencing based upon the possibility that there may be some assault charge filed again him in New York State. So tell me -- tell me how he wishes to proceed at this point.

MR. BARTH: He is only requesting a 30-day continuance, your Honor.

(Defense counsel and defendant confer briefly.)

MR. BARTH: I think, your Honor, 30 days would

give him some opportunity to see if there was going to be any charges brought against him, and the 30 days would also give him an opportunity -- as I understand it, they're working with him at Stafford where he is currently residing to get his medications set correctly such that -- such that he'd be in a calmer state of mind and such instance would never happen again.

THE COURT: Well, frankly, the other issues, that may take a written opinion. You have raised a number of issues in regard to crimes of violence whether to be applied to Mr. Van Mead, and my intention was to go through the hearing, listen to argument of counsel, and then make a determination as to whether in fact there needs to be a written order assessing whether either or both of the predicate offenses are violent offenses, which then increase his offense level.

And my suggestion is that we go through the arguments first, and then the Court can address that. But you tell me, does he have some particular medication problem that makes it difficult for him to be cooperating at this point or not?

(Defense counsel and defendant confer briefly.)

MR. BARTH: Your Honor, I indicated a moment ago that I had had some inability to communicate with my

client over the past two weeks. If I may just have a brief moment to explain something to him?

THE COURT: Okay.

(Defense counsel and defendant confer briefly.)

THE COURT: All right. Mr. Barth, do you want some time to speak with him upstairs? I am not about ready to postpone this based upon the possibility of some charge in New York State. There are complicated legal issues to be addressed in the sentencing. My expectation was to proceed to talk about those particular issues because they go right to the heart of the guidelines here.

MR. BARTH: Yes.

THE COURT: And if I could make a determination from the bench, I would; then proceed to sentencing. If not, I would need some time to write an opinion. So, you tell -- maybe it would be best if you meet with him upstairs and you tell me how he wishes to proceed at this point.

MR. BARTH: Very well.

THE COURT: Because I -- if you have a lack of communication with him, then is he seeking a new lawyer? Is he not seeking a new lawyer? What -- what is his expectation at this point?

MR. BARTH: As I had indicated, I'd expected that he might seek a new lawyer, but having had 15 minutes to speak with him upstairs, I don't think that's the case, your Honor.

THE COURT: Okay.

MR. BARTH: He's free to correct me, your Honor, but based on my conversations with him, he seems content with his defense team at this time.

If I might ask of the Court, is the Court, based on the legal memoranda that have been filed by the parties, leaning towards a written decision? If it is, that would suggest to me that sentencing would not take place. I can inform my client of that, and perhaps that would make him feel more comfortable about the hearing today.

THE COURT: Am I leaning in that way? I think that those are significant issues. In particular, I am interested in the distinction between the New York State statute and the Vermont statute, whether Begay would be applied or how it would be applied, in particular in the crime of violence.

And in regard to the other offense, my expectation is that the government can prove that he pled to Count 4, which is a burglary of a dwelling, and there is no confusion. But I don't know that because I haven't

heard argument.

So, I don't know, frankly. I just -- I came into the courtroom with an open slate as to whether in fact this would require a written order or not. Then you have raised constitutionality questions as well in your memorandum.

MR. BARTH: Yes.

THE COURT: So usually when those kinds of issues are presented, an opinion needs to be written, but I want to hear arguments of counsel.

So do you want some time to speak with him?

MR. BARTH: Yes, your Honor.

THE COURT: We have a sentencing at 10:30, and so this could be postponed till later in the morning.

MR. BARTH: Very well. Thank you.

THE COURT: Okay. Thank you.

MS. NOLAN: Thank you.

(Court was in recess at 10:18 a.m.)

(The following was held in open court at 2:05 p.m.)

COURTROOM DEPUTY: This is case number 11-87, United States of America versus Terry Van Mead. The government is present through Assistant United States Attorney Christina Nolan. The defendant is present in the courtroom with his attorney, Steven Barth.

The matter before the Court is a continuation of

the sentencing hearing.

THE COURT: All right. This is a continuation of the hearing. The Court's ready to hear argument in regard to the crimes-of-violence issue which has been raised by the defense.

You have had some time to talk to your client, Mr. Barth?

MR. BARTH: I have, your Honor.

THE COURT: How do you wish to proceed at this point?

MR. BARTH: I am prepared to go forward with argument, your Honor.

THE COURT: Okay.

MR. BARTH: And if I may, thank you, your Honor, for indulging the defense, and I think it definitely helped, and I had an extra opportunity to speak to Mr. Mead.

THE COURT: Okay.

MR. BARTH: And for the Court's understanding or information, "Van" is actually his middle name. So he is "Mr. Mead."

THE COURT: Oh, all right. Okay.

MR. BARTH: Your Honor, I think I was fairly detailed in my papers. 4B1.2, which carries the definition of crime of violence, which is referenced by

2K2.1(a), I believe, expands upon the definition found in 18 USC, section 924(e), which is the -- the definition of violent felony under the Armed Career Criminal Act. And it did so really in one important way. It expanded the list, the enumerated -- list of enumerated crimes. It has burglary, arson, extortion, crimes involving explosives, but it also has murder, manslaughter, kidnapping, aggravated assault, extortionate extension of credit. And so there is an increase in the number of crimes enumerated that make up or that are considered crimes of violence under the definitional section 4B1.2 in comparison to 924(e).

What I find notable is that this definitional section of 4B1.2 does not include statutory rape, and I have made a canon of statutory construction argument, and I think what breathes life or strength into my argument is in a cross-reference that I made, my own cross-reference to 2L1.2, which is the guideline section for illegal reentry after deportation, which also carries its own definition of crime of violence.

Now, interestingly about 2L1.2, your Honor, is that it also has an enumerated list of crimes that are crimes of violence. And it is identical in every respect to that found in 4B1.2 with one exception: It increases, it broadens sex offenses. Not only does it have

forcible sex offenses but it actually lists statutory rape.

So what you have is two lists of crimes that make up crimes of violence, one in 4B1.2 and one in 2L1.2. One includes statutory rape, 2L1.2, and one does not, 4B1.2. And of course that's what we're talking about. We're talking about statutory rape.

The New York penal code, it's not called statutory rape as your Honor is well aware, but it's a fairly generic statutory rape statute. Age of consent is 17, so anybody who's 16 years, 364 days old, who has intercourse with somebody 21 or older, is a victim, and the person who's 21 years or older is a felon.

THE COURT: At least -- you may not like the fact that the Court is bound by Second Circuit precedent, but, generally speaking, it is, and the Daye case seems to suggest that statutory rape is in fact a crime of violence, at least as it interpreted the Vermont statute which sets the age at 16 or below.

What is it about the New York statute which is sufficiently distinguishable from the Vermont statute to suggest that I could distinguish this particular case from Daye? Because I am somewhat bound by Second Circuit precedent.

MR. BARTH: Not your Honor.

THE COURT: Oh?

MR. BARTH: Not your Honor.

THE COURT: No?

MR. BARTH: Let me clarify something. I am only upset about Second Circuit case law when it disagrees with me.

THE COURT: Oh, right.

MR. BARTH: When it agrees with me, I'm perfectly happy.

THE COURT: Just fine.

MR. BARTH: So, let me answer your question --

THE COURT: But you have raised the Fourth Circuit, the Seventh -- the Sixth Circuit, the Seventh Circuit, the Ninth Circuit, the Eleventh Circuit, all of which disagree with the Second Circuit.

MR. BARTH: Yes.

THE COURT: And some of those opinions have suggested that the Second Circuit decision in Daye was not rigorously explained.

MR. BARTH: Right. And as I will argue in a minute, it wasn't faithful to the holding of Begay. But I want to make something clear. An analysis of Daye and the categorical analysis is important, and I will explain to you why I think, as I did in my papers, that this case is factually distinguishable from Daye.

However, I am making arguments here with regard specifically to the guidelines, and my canon -- my arguments revolve around canons of statutory construction, including the one referenced in my paper, which were not raised in Daye.

Daye was simply an analysis of the statute, the Vermont statute, in light of the recent holding in Begay. And while I don't think they got it right, and every other circuit who has looked at this issue agrees with me and disagrees with the Second Circuit, I have raised arguments that were not addressed in Daye, and this is one --

THE COURT: But isn't the language in 4B1.2 of the guidelines taken directly from the armed career criminal statute?

MR. BARTH: The residual clause is.

THE COURT: The residual clause of the armed career criminal statute.

MR. BARTH: Absolutely.

THE COURT: So --

MR. BARTH: That is absolutely correct. And --

THE COURT: -- when they made that determination about what that crime of violence meant, and the language is the same when you are looking at

4B1.2, well, you know, that's -- doesn't take a brain scholar to -- brain scientist or a rocket scientist or a scholar --

MR. BARTH: None of which I have.

THE COURT: -- to say it applies.

MR. BARTH: None of which I have.

THE COURT: Right.

MR. BARTH: I can't deny obviously that the residual clause language in 4B1.2 is identical to that in 924(e), and I cannot deny Daye -- Daye's holding rests on the residual clause. However, my argument, that was not considered in Daye.

I think Daye was an ACCA case. I don't think it was a career offender case, so I don't think 4B1.2 played a role, but -- I could be wrong about that. But we are talking about the definition in 4B.2, and that residual clause, your Honor, only follows after a long list of enumerated crimes, crimes that were not considered in Begay and Daye, and one has to read that residual clause with that enumerated list in mind.

There's another canon of statutory construction or maximum construction, *noscitur a sociis*: A thing is defined in part by the terms associated with it. And Begay itself did that. Begay itself did that. Begay took a look at the residual clause and said, well, not

only must we look at the degree of risk that a crime must meet to meet the requirements of the residual clause, we have to look at the kind of risk. Is it similar in kind to arson, burglary, extortion?

Well, the enumerated list of crimes in 4B1.2 is not limited to arson, burglary, extortion, or crimes involving explosives. And, as we will talk about in a moment, the Second Circuit, in my mind, is not faithful to the holding of Begay in any event. But I need to make it clear that, yes, the resi- -- while the residual clause is identical, the list of crimes is not, and Daye did not consider my statutory construction argument with regard to the drafting of this guideline and 2L1.2.

It's notable, your Honor, that 2K2.1 could have very easily referenced not just 4B1.2; it could have referenced 2L1.2 as well. It's also notable, I believe 2L1.2 was amended in 2003 to include statutory rape as a crime of violence. And my recollection is they did that because a series of, I believe, Fifth or Seventh Circuit cases which hound -- held that statutory rape is not a crime of violence under 2L1.2.

Well, now we have all these circuits -- you just listed them -- that have found statutory rape is not a crime of violence for ACCA purposes, and yet the commission has yet to change, in light of those cases,

4B1.2's list to include statutory rape. Because if it wanted to, in light of the cases, it certainly could have and it's chose not to.

So, in short, to answer your question, yes, you are bound by Daye. And yes, I have a reason why this is factually distinct from Daye. But there is an additional legal argument that I am making here that was not addressed in Daye.

I also -- and I will get, again, back -- I haven't forgotten the Court's question about how is this factually different from Daye, but I do want to address some of the government's arguments in response to my statutory construction argument.

And they -- they say, look -- at least one of their arguments is, look, if -- if -- if the definitions in 2L1.2 and 4B1.2 weren't the same, you'd end up with absurd results. In other words, well, if statutory rape is a crime of violence under the illegal reentry guidelines, it must be under 4B1.2.

But that argument doesn't make sense and it doesn't make sense for the following reason, one of -- one of example: 2L1.2, if you are convicted of a crime of violence, gives you a plus 16, whereas if you are convicted of a crime of violence under 2K2.1, prior crime of violence, then your base offense level goes

from a 14, if you are a prohibited person, to a 20. And then if you have a second offense for a crime of violence, goes to 24. I believe my numbers are correct on that.

So they're -- they're -- the results were not meant to be the same. They were both looking at crimes of violence but obviously 2L1.2 thought a prior crime of violence warranted plus 16, whereas 2K2.1 only plus six, and in the case of a second prior conviction, another plus four.

The government also argues that my canons of statutory construction argument is flawed because this -- this 4B1.2 enumeration of crimes is simply illustrative, not exclusionary. And I would agree with that. I would agree it's illustrative. Obviously there's a residual clause there so the residual clause is meant to capture some crimes not included in the list of enumerated crimes. So I don't disagree with that.

But -- but the fact that it's illustrative strengthens my argument, *noscitur a sociis:* You are defined by the terms that you are associated with. And we are talking about crimes that carry a high degree of risk, and as Begay said, and here we are at Begay now, purpose, violence, and aggression. And that's where Daye got it wrong.

Begay was talking about DUIs, and it determined that DUIs are a strict liability crime. And it didn't amount to the kind of crime that the enumerated crimes did, i.e., it was not purposeful, violent, nor aggressive. Statutory rape is analytically in the same -- same realm.

The Second Circuit in Daye said, well, you choose -- you choose to have sex with a person. That's true, but that's not the malum of the crime. Just like in drinking and driving, you choose to drink, but that's not the malum of the crime.

THE COURT: Well, but that's not -- that's not only what they found. They said you choose to have sex, and that's a voluntary act, but the -- the victim or the sexual partner can't consent because the victim is 15 or younger and, as a result, there is no such thing as consent, which implies that there must be some level of coercion if not violence. That's what they found, did they not, in Daye?

MR. BARTH: Well, I guess -- I guess that that was part of their holding so I can address that. I don't see the factual or legal significance or difference between driving under the influence and statutory rape. A -- factually speaking, not legally, a person one day away from their 17th birthday can consent

to have sex with a 21-year-old.

THE COURT: Well, that's -- you may be closer to -- I am not going to say you are correct, but closer to correct when you are talking about somebody one day away from a 17th birthday or one day away from the 18th birthday, but that of course suggests that you may have to go beyond -- for statutory rape, you may have to go beyond the elements of the offense, the categorical approach, to look -- and to use -- to use Shepard, I understand you use Shepard, but to go beyond the categorical approach to look at the charging documents and the statements during the course of the sentencing, statements of the court, to find out if in fact there's a level of violence in that individual circumstance.

MR. BARTH: And now what we are talking about is the two-step analysis --

THE COURT: Right.

MR. BARTH: -- the modifying categorical approach.

THE COURT: That's right.

MR. BARTH: But before we can employ a modified categorical approach, we have to know, as the Second Circuit has instructed us, whether this statute, the New York statute, is divisible. And the government hasn't shown that to be divisible. And, in fact, your

Honor, the Second Circuit has only found statutes divisible where the offenses are listed in a different subsection or comprise discrete elements of a disjunctive list of a proscribed conduct. That's not the case here. That isn't the case. You don't have you are guilty of statutory rape if A or B or C.

Now, the Second Circuit has left open the question about whether there might be some other tests to determine when a statute is divisible.

THE COURT: All right. So what you are saying is that for this Court, the district court, to go beyond the categorical approach, looking at the elements of the offense, to actually sort of invading the fact-finding process of -- regarding that particular offense, to be able to do that you have to show that the crime itself is divided into subsections, one of which involves forcible sex, the other involves consensual sex, something of that general approach? That's --

MR. BARTH: That's an exact example.

THE COURT: That's the only time you can go beyond a strict consideration of the elements of the offense? Because that's not consistent with what I always thought. I thought if the statute unto itself creates a sufficient level of ambiguity to assess whether a particular crime that was -- that was the

subject of the conviction was a violent crime, you -- all you needed was that level of ambiguity. Then, you could go to the charging documents and you could find out whether in fact that person committed a forcible act as opposed to one which was not.

MR. BARTH: The answer to your question is determined based on what circuit you are in. The argument I am making for this divisible statute with the test I just read to you from a Second Circuit case is the approach used in the First, Fourth, Fifth and Eighth Circuits as of late 2011. The Second and Eleventh remain ambiguous about which approach they use, but they have only used it in the circumstances that I read to you, where you have -- and think of it this way, your Honor:

You have a statute, and we have all seen lengthy state court statutes where it's -- for instance, if you -- you are guilty of burglary in the first degree if you enter a dwelling with the intent to commit a crime here, if you enter an outhouse, if you enter, you know, a business, if you enter -- a vending machine like the Massachusetts -- at least they used to have a vending machine as one of their burglary statutes, that may all be under one section. It's divided up into four, five distinct crimes.

The categorical analysis which moves on to the second stage or modified approach where then you get into what documents you can and can't use, I am arguing to this Court, and certainly several circuits have agreed with me, that you only move to that second stage when you have multiple divisible proscribed acts, different crimes laid out with their own elements, and you are trying to determine which one the defendant was actually convicted of.

That is, the second stage analysis isn't a back door to look at what actually happened, you know, whether or not the person actually beat somebody up instead of, you know, was just a, you know --

THE COURT: What you are suggesting is that there may be four different kinds of proof, and the second stage of the categorical analysis is to figure out whether it's one, two, three or four.

MR. BARTH: Of a statute.

THE COURT: And the dwelling would be the example.

MR. BARTH: Exactly.

THE COURT: So what you are suggesting is you cannot go to the second stage in a situation in which there is no subsections, but it's merely an ambiguous statute as to whether it's violent or not, so that you

could figure out whether in fact it's a crime of violence.

MR. BARTH: Exactly. Exactly. I think -- I think you understand my argument.

So, the government, since we have transitioned to this -- to this part of the argument, the government has suggested, or argued, I should say -- I haven't suggested they have argued -- that because the indictment in this case, this previous case, the statutory rape case, included the age of my client, 30, and the age of the victim, 15, that that takes it out of sort of any possible argument that this isn't a crime of violence because -- and I guess that's in response to my answer to your question, how is this factually different from Daye.

And it's factually different because the age of consent is a year -- a year higher. It's a year higher. And that's important. That is a significantly important fact here that the difference is somebody who is 15 and 364 days versus somebody's 16 and 364 days. And it's made important because Daye was decided incorrectly.

And so this Court has seen every other circuit. I have listed all the circuits that have looked at this issue and gone the opposite way from Daye, and I am not suggesting that this Court should hold that Daye was --

was wrong. Obviously it can't do that. It can't hold a contradiction in Daye.

However, what this Court can do is limit Daye, narrow it to the precise findings and factual scenario. And this case is different. The age of the victim is a year older. And the fact that the factual -- the actual facts of this case may be that my client was 30 and the victim was 15 are neither here nor there because the government hasn't shown that this is a divisible statute.

THE COURT: Of course the Second Circuit has rejected that whole argument implicitly when they found in Daye that that is -- that statutory rape is a crime of violence. They basically ignored that whole divisible argument because they said in just applying that first stage, the categorical approach, it's a crime of violence.

MR. BARTH: Absolutely. The Second Circuit, as I remember, in Daye, didn't -- didn't even do a second stage analysis because it said this crime is categorically a crime of violence.

THE COURT: Right. And you wouldn't have to do a second stage if in fact you --

MR. BARTH: Right.

THE COURT: -- make that determination. So I

have got a Second Circuit precedent which has already made that determination. The only way to distinguish Daye, and that's all this Court has the power to do --

MR. BARTH: Yes.

THE COURT: -- is to say that there's a difference between the New York statute and the Vermont statute in terms of age.

MR. BARTH: Which is important. I mean, that's very important.

THE COURT: So does that mean this whole analysis that you are talking about, this subsection argument in the second part of the categorical approach, I don't even have to deal with because the Second Circuit has told me, don't deal with it? It's not particularly relevant because the first stage has already been satisfied and this is a categorical -- this a crime of violence.

MR. BARTH: Remember, they only told you that with regard to the Vermont statute, not with regard to this New York statute, and there is a difference between the two statutes. Okay?

THE COURT: Okay.

MR. BARTH: So -- and so your Honor's asking me, and putting my feet to the fire, as you should, you know, why should -- why is Daye distinguishable? Why

should I even consider the second stage analysis?

I am saying there is a significant difference, particularly in light of the holding of Begay: purposeful, violent and aggressive, where every other circuit agrees with Mr. Mead's argument.

Making this factual difference in this New York penal statute, the age of consent is a year older than the one in Vermont, that allows this Court to find in accord with every other circuit that's looked at this issue that this particular New York penal statute is not categorically a crime of violence.

THE COURT: So when it goes up -- when it goes up on appeal --

MR. BARTH: She's not going to appeal.

THE COURT: Oh, really?

MR. BARTH: She's already told me.

THE COURT: No, she's not?

MR. BARTH: I am teasing.

THE COURT: So if it goes up on appeal, you have all of these circuits -- the Fourth, the Sixth, the Seventh, the Ninth and the Eleventh -- all saying statutory rape is not a crime of violence. You have the Second Circuit saying, oh, yes, it's a crime of violence but only if the statutory maximum is for -- only if the statute calls for 16 and below as opposed to 17 and

below. So if it's 17 and below, well, that's really not a crime of violence, but if it's 16 and a below, it's a crime of violence.

MR. BARTH: Yes.

THE COURT: That's the fine-tuning distinction that you would be asking me to arrive at.

MR. BARTH: Yes, that is. But don't forget, your Honor, one, I don't -- I don't consider it fine tuning. What if it was 18? What if it was 19? I mean, so these are years. So years -- the years matter. So I don't -- I don't necessary -- even under Daye's reasoning, you know, the -- so I don't know that it -- I would -- I would agree with most of what your Honor has said. I would disagree with the characterization of it as fine tune. I would say tuning.

THE COURT: Tuning. Or someone might say circumventing.

MR. BARTH: I would never ask your Honor to ever do that.

THE COURT: All right. Well, then what about the second issue in regard to crime of violence, and that's breaking into the dwelling? Was he convicted of that -- of the Count 4, breaking into the dwelling? Or was he convicted of one of the other nondwelling?

MR. BARTH: I don't -- I don't know. And, you

know, I made certain objections in -- in -- in -- and I think Probation Officer Bendzunas was very faithful. I mean he, for the most part, put my objections in the addendum word for word. And at that time it appeared to me that there was a question about whether Mr. Mead had been convicted of a burglary of a building versus burglary of a dwelling. And the reasons are the contradictions in the charging -- the amended indictment and the -- what I would call the judgment; they called it something else, but the uniform commitment order, whatever they called it. And there were several.

Then I learned, after my objections had been sent to Mr. Bendzunas, from the Assistant U.S. Attorney that she had another judgment and commitment form or uniform commitment form, both of which, as I understand the one I had, the one Mr. Bendzunas had, and I believe even the government had -- previously had, were certified by the clerk of the court, but apparently an agent for the government went and got a second judgment and commitment form.

Now, that only caused me more confusion because I don't understand how you could have one judgment and commitment form that says one thing and a second one that says something else.

THE COURT: Well, now there's also a copy of

the presentence report in that particular case, at least this is my understanding --

MR. BARTH: Yes.

THE COURT: -- that Mr. Bendzunas got a copy of the presentence report which clearly indicates that Mr. Mead was convicted of burglary of a dwelling, Count 4. References Count 4. Have you seen that?

MR. BARTH: I haven't seen the presentence report. I, of course, have read his addendum with what he has put in it, and I would argue, first, as I do in my papers, we can't -- we are trying to determine what Mr. Mead was actually convicted of. So what are we doing here again? We are doing a modified -- the second stage of a modified categorical analysis. What -- what was he actually convicted of?

THE COURT: Well, that's a different -- this is a totally different area, though. We are not looking into crimes of violence. We are looking at what was he convicted of, and if in fact you look at the presentence report, and the presentence report says he was convicted of burglary of a dwelling, Count 4 of a four-count indictment, the only count which dwelt with dwelling, you know, that seems fairly definitive.

MR. BARTH: So the Court -- the Court -- just to complete the record, I would argue that the PSR is

a -- not a Shepard document that can be used. Obviously the Court thinks this is outside the ambit of Shepard in the categorical analysis, so I will move on to my second argument, which is neither the new judgment and commitment form nor the presentence report clarifies. It doesn't clarify enough to know what he was convicted of.

Even in the government and the presentence report quotes that I read in the addendum indicate he was convicted of Count 4, but if you look at the judgment and commitment form, including the government's -- the one they found after -- after my objections to the presentence report, which I believe are attached as an exhibit to their sentencing memorandum, it includes aiding and abetting. It includes -- he was convicted of an aiding and abetting offense, and it has an extra statute number there, which I have to assume is the aiding and abetting statute, and that's not what he was charged with in Count 4. He was charged with a substantive crime. And there's no mention of aiding and abetting nor this extra statute which is referenced in the judgment and commitment form.

THE COURT: So in the new judgment and commitment order from the government, the government's produced, to 4, Count 4 --

MR. BARTH: Yes.

THE COURT: -- they reference aiding and abetting, which was in fact never charged?

MR. BARTH: Not according to the indictment. So if you look at -- let me just make sure I have theirs, which -- yes. Their -- I believe which is attached as document 33-5. The government wants to correct me on this, please do. But I believe their new uniform sentence and commitment form is attached as 33-5.

And here you will see, unlike 33-4, which I think is the old uniform sentence and commitment order, it says Count 4, which in fact was the count in the indictment. However, you also see that says ATT, attempted burglary, illegal entry, dwelling, and then it has penal law 110-140.25-02. And the indictment, which is the fourth count, only references 140.25, and it's a substantive crime, not an inchoate crime, not an attempt. And so there's still confusion about what Mr. Mead was convicted of.

And we get back to the idea, I don't understand how you can have two court certified sentencing documents which are materially different.

THE COURT: Okay.

MR. BARTH: So if -- if it was burglary of a

dwelling, then it's a crime of violence. As the government points out, if it's a burglary of any building, under Second Circuit case law -- I believe the case is Brown and I reference it in my sentencing memorandum as well -- then it's still a crime of violence. However, I think we don't know exactly what he was convicted of. We don't know -- and it says amended indictment. So I'm just confused, your Honor.

THE COURT: Okay.

MR. BARTH: And the documents don't make it clear to me what he was convicted of. I had assumed it was either burglary of a dwelling or burglary of a building. Now I am just not sure because we have two different certified copies of a judgment and commitment order, neither of which are faithful to the actual charging document that I had, that the government still has, and that the probation department has.

THE COURT: All right. Well --

MR. BARTH: But, but, but the government's right.

THE COURT: I think you did talk about aiding and abetting. I am just putting together your argument.

I looked at the fourth count. It clearly is a substantive count. It's not an attempted account -- count.

MR. BARTH: Yes.

THE COURT: It's did knowingly and unlawfully enter the dwelling with the intent to commit a larceny. And then looking at, I think, which is the most recent judgment and commitment order, or uniform sentencing and commitment, I guess they call it in New York State, attempted burglary, illegal entry, dwell, four, I assume that that's what is meant by the -- the area -- that's the count he was convicted of.

MR. BARTH: Yes. That was an issue I raised with regard to the initial document which, I believe, is 33-4 and which the probation department and I both had, but it remains an issue in the government's newly-found uniform sentencing and commitment order document.

THE COURT: Okay. All right? Well, let me get the government's response to --

MR. BARTH: Very well.

THE COURT: -- these issues.

MR. BARTH: And, of course, your Honor, very briefly, I raised this in my papers to preserve for appellate review, but --

THE COURT: Justice Scalia's dissent.

MR. BARTH: Yes. Both -- both the attempted burglary, according to the probation officer, and the statutory rape require, rest upon, in the probation

officer's analysis as well as the government's, the residual clause, and my argument mimics, mirrors, echoes Justice Scalia's, that this is --

THE COURT: On -- for vagueness.

MR. BARTH: Yes.

THE COURT: Right.

MR. BARTH: Correct.

THE COURT: Okay.

MR. BARTH: Thank you, your Honor.

THE COURT: All right?

MS. NOLAN: Thank you, your Honor.

On the attempted burglary issue, I don't see any confusion here. The statute that's referenced in both of the conviction records is 140.25, subsection two, which subsection -- it's subsection two that's the additional thing being referenced. I don't know if Mr. Barth is confusing that with aiding and abetting, but the New York statute, the way it's written, it's subsection two of 140.25 that makes it a crime to break into a dwelling. So that's what that two is.

THE COURT: Okay. But where is the attempted?

MS. NOLAN: Well, your Honor, as you well know, attempt is always a lesser included offense when you charge a substantive count. I think the only thing we can conclude from this is that he pled to attempt

which would be subsumed within the substantive charge.

THE COURT: Attempt is a lesser included offense?

MS. NOLAN: Of any count.

THE COURT: I am not sure that that's right. I mean, in a lot of offenses -- attempt requires specific intent. It's specific intent not just when you are in the place to steal, but it's specific intent to commit that particular offense. That's an added element to the substantive offense of burglary of a dwelling house.

So, I never knew attempted was a lesser included offense. Now, that doesn't mean that he didn't plead to attempted burglary of a dwelling, but it's not charged here. How does it get, fourth count, from a substantive offense to what appears to be attempted burglary?

MS. NOLAN: It would seem to me that if he committed -- if you charged him with actually committing the burglary of the dwelling, then you have also charged him with attempting to do it. And it appears -- I mean, both of the conviction records say that it's --

THE COURT: Logically, that's correct, from -- I shouldn't say colloquial, but you understand attempt, when you attempt to do something, you have the specific intent to actually commit the particular crime, so you

have to actually show and prove specific intent to commit that particular offense, which is an element which is not included in the substantive offense.

That means, because you have an additional element, it's not a lesser included offense. It has to be specifically charged and then substantiated, but --

MS. NOLAN: And --

THE COURT: Regardless.

MS. NOLAN: And fair enough. And there's no doubt that there's an ATT, attempted, you know, before the burglary, when it lists in these conviction records the charge that he pled to. Of course, attempted burglary of a dwelling is a crime of violence. That's pretty well settled. The guidelines says it; the Supreme Court has said it. So I don't think it matters too much how he got there. It's pretty clear what he was convicted of.

THE COURT: Yeah, but his argument, I think, is that one of the first three counts may have included that attempt; in particular, Count 2 I think is what was referenced before. And does that suggest that they're really confused about which offense he pled to? Anyway. No, I --

MS. NOLAN: If he pled to any of these offenses, or attempting them, that would all be -- they

would all be crimes of violence under Second Circuit case law, under Supreme Court case law. The Second Circuit has decided that burglary of a building, this very statute that he might have been convicted of, if there was a mistake, is a crime of violence. So any of one of those--

THE COURT: Oh, wait a second. Then I am really confused. I thought the distinction was dwelling, has to be of a dwelling to actually constitute a crime of violence. A burglary of an outbuilding is not a crime of violence.

MS. NOLAN: Your Honor, United States versus Brown, unless I am reading it correctly, which is always possible, held that violation of the New York burglary in the third degree statute, which is what's charged in Counts 1 through 3, is a crime of violence for purposes of the guideline enhancement. And the reason that Brown held that is because burglary of a building had already been ruled a crime of violence by the Second Circuit under the Armed Career Criminal Act and because the circuit has pretty consistently -- well, very consistently said that you -- you apply them the same way.

THE COURT: Okay.

MS. NOLAN: They mean the same thing.

THE COURT: All right. So I will have to look at the Brown decision, because if they actually take that provision, which does not refer to dwelling, and say that a burglary of an outbuilding or burglary of a nondwelling is a crime of violence, that would be extraordinarily unique.

The Sentencing Commission, from day one, at least day one as long as I have been on it, always referred to a burglary of a building which was not a dwelling as not a crime of violence.

So what you are suggesting is the Brown case, at least in its application of that particular statute, goes a different way?

MS. NOLAN: And it's -- yes. And it's interpreting --

THE COURT: Okay.

MS. NOLAN: -- 4B1.2, which is the enhancement that's at issue in this case and the provision of the guidelines application in this case.

THE COURT: Okay. And how about the statutory rape?

MS. NOLAN: Your Honor, the government doesn't see any way out of the Daye holding. Daye held that statutory rape is a crime of violence or a violent felony, they held specifically, under the Armed Career

Criminal Act, because of the inherent susceptibility of minors to the use of force and coercion by adults into sexual acts.

It's -- it held that -- it said that the test was that that -- that the crime, the statutory rape, had to typically -- a typical instance of it involved a risk of coercion, use of force. It doesn't have to be every single time; that's not the test. But the typical statutory rape case will involve a risk of violence, use of force, aggression. That is at least as palpable or as strong a risk or high a risk as you would have in a burglary case.

In fact, the Second Circuit in Daye said, We think the risk is probably even higher in statutory rape cases than in burglary cases. So extrapolating that out to the New York statute, there doesn't seem to be any meaningful difference between the statutes.

THE COURT: Well, is the fact that the New York statute says 17 or below as opposed to 16 -- does that make a difference?

MS. NOLAN: I can't imagine why it would because Daye said that the risk is that you're engaging in sexual acts, specific kinds of sexual acts, and they are more involved sexual acts. This is not, you know, kissing or just touching each other. But that you are

doing it with somebody who is deemed unable to consent.

In Vermont, you are deemed unable to consent when you are under 16. In New York, you are deemed unable to consent when you are under 17. To the extent your Honor's concerned about that difference, the New York statute actually had an age disparity requirement. So, to the extent your Honor thinks that it wouldn't be -- the risk wouldn't be present for a 16-year-old but it would be for a 15-year-old, which is what I take defense's argument to be, well, the Vermont statute had no minimum requirement for the minimum age of the perpetrator, whereas the New York statute, even though the age of consent is a little higher, they have a four-year requirement.

So I think that that -- the requirement that there would have had to have been an age disparity may -- can give the Court comfort that it was the type of crime that would always involve a risk of aggression or violence or force.

THE COURT: All right. Now, you have also objected to the presentence report because there's not a recommendation of a four-level increase for possession of a firearm in connection with another offense, and I assume that you are talking about the burglary.

MS. NOLAN: The burglary of the homes.

THE COURT: Okay. So how -- the state never charged him with burglary. How do you -- how do you get the Court to essentially calculate or arrive at a conclusion that he was the one who broke into those two houses to steal the 15 guns?

MS. NOLAN: I don't think the Court need -- need conclude -- well, first of all, the standard is different. I am not suggesting we could prove it beyond a reasonable doubt but by a preponderance of the evidence that he was involved in some way in those burglaries.

The best evidence I can point to is that his presence down near Rutland in the morning, and in Chittenden County, in Williston, that afternoon, has him passing through Addison County at right -- roughly the times that the burglaries were reported. So I think that's a piece of circumstantial evidence.

And then how he reacted when -- well, first he went and sold the guns as quickly as he could, which shows consciousness of guilt and, secondly, he fled from law enforcement, which is also an indicator of a guilty mind, of somebody who is showing guilt for something, namely the burglary -- the burglary in Addison County.

I mean, how did those guns get to him literally within an hour or two of the burglary?

THE COURT: Well, to what extent are you speculating as to whether or not he broke in or not or bought it from somebody on the way through or whatever?

MS. NOLAN: I would -- I am suggesting that the evidence is strong enough to infer that he possessed them in connection with being -- with having some involvement in the burglary.

THE COURT: It is fair to say that the state's attorney chose not to charge him with the burglaries, just the possession of stolen property; is that correct?

MS. NOLAN: Yes. They charged him with DWI, resisting arrest. I don't -- I am not sure if there was a stole -- I think the stolen property has been our bailiwick. But -- but, yes, that is true.

THE COURT: Okay.

MS. NOLAN: Your Honor, I just wanted to say one other thing about this divisible argument, which I heard for the first time today.

I was just looking at the Walker case, United States versus Walker, which is 595 F. Third 441, and that's a case in which the Second Circuit used the modified categorical approach to determine whether a prior conviction would -- would constitute a crime of violence for purposes of the firearm enhancement for 2K2.1. And it used the modified categorical approach,

and what it did was what I have always thought you were supposed to do, was determine whether the prior offense -- whether it could have involved conduct that was both a crime of violence and was not a crime of violence. And if you decide that it could be both, then you go to the next step.

THE COURT: Okay. But does that ambiguity, whether it's a crime of violence or not, have to be set forth in subsections of a particular statute? Or can you just look to the statute, say this is ambiguous as to whether it may be a crime of violence or may not, and therefore I can go to the modified categorical approach?

MS. NOLAN: Every case that I have read, I have not seen anything about how -- that the ambiguity has to be set forth in the statute. It -- to me, the cases that I have always read, is the statute he is convicted under, if it covers conduct that both is a crime of violence and is not a crime of violence, then you go to the modified -- then you go to the Shepard documents, and this case is an example of where they did that.

THE COURT: Okay. The Walker case involved what state and what statute?

MS. NOLAN: Well, South -- well it was South Carolina, strong-armed robbery.

THE COURT: Okay. And does that particular section -- that particular statute have a number of subsections --

MS. NOLAN: No.

THE COURT: -- some of which are violent, some of which aren't?

MS. NOLAN: No. I guess what I am trying to say is I'm just not -- I feel like I have read a number of the cases on this point lately, on this issue, and I have not seen a case that draws that distinction in the Second Circuit or, frankly, not in the Supreme Court cases I cited that -- that describe how to do the modified categorical analysis if you get past the categorical analysis.

THE COURT: Okay. Okay.

MS. NOLAN: Does your Honor -- and I just would like to say for 3553(a) factors --

THE COURT: I think this is a really significant legal issue, and based upon the argument, I'd like to address -- I'd like to write something on this. It's fair to say that the definition of crimes of violence is inconsistent; it's all over the place. The Sentencing Commission has been dealing with this for years and years and nobody has been able to come to a general consensus.

How it's handled, in particular, the 2L1.2 cases, is extremely important. And this is important for the Second Circuit. I would be interested to research -- research the law, so it means a postponement of the ultimate sentencing. And then once that's resolved, I can write something on that, and then we will come back for sentencing and then you can address the 3553(a) issues because you will know exactly where you start at this point.

MS. NOLAN: Understood.

THE COURT: Okay?

MR. BARTH: If I may have a brief response, your Honor?

THE COURT: Yes.

MR. BARTH: First, the government cites U.S. V Brown. I also cite it in my papers, and I understand their -- their reading of the case to be correct, that is, under the residual clause, the Second Circuit has interpreted burglary of any building to be a crime of violence, even though under 4B1.2 it only says -- it narrows it to burglary of a dwelling. And I initially raised this issue, despite the fact that any of those counts include burglary, because I thought it notable, noteworthy, important to preserve that issue because, look, the Sentencing Commission has spoken, burglary of

a dwelling, and yet here the Second Circuit, to borrow a phrase, has circumvented the commission's list by saying, well, the residual clause sucks up any burglary of any thing any time.

However, my argument now is slightly more broad than that, more than just preserving the issue of whether the Second Circuit got it right in Brown when it said burglary of any building is a crime of violence. Now, I am actually and honestly confused about what he was convicted of, whether -- because we have, yes, an indictment that has four different burglaries, but the conviction documents, and we have two of them now, don't match up to those four counts. So we don't know that he was actually convicted of any of the counts in that indictment.

THE COURT: But if all four of the counts constitute crimes of violence, doesn't it become just an academic question as to which one he pled to?

MR. BARTH: No, because we don't know that he pled to that particular charging document. Remember, that document says amended. And the uniform sentencing documents, both of them, don't match up with that -- with that -- that indictment. So for all we know, all the documents are wrong. The indictment may not be the right indictment. After all, if I went to the clerk's

office tomorrow, maybe they'd give me a new indictment certified by the clerk.

So I think it's more than just me preserving this issue to challenge Brown at the Second Circuit level. This is really, we don't know what he was convicted of.

THE COURT: When was the Brown decision?

MR. BARTH: I'm -- you know, it's in my memorandum. I --

THE COURT: Is it post-2008, post-Begay?

MS. NOLAN: December 30th, 2008.

THE COURT: December 30th of 2008?

MS. NOLAN: Yes, your Honor.

MR. BARTH: So -- so I believe the government's reading of U.S. V Brown is an accurate one. I just -- I wanted to make clear why I am raising this issue, and it's because there is a real confusion about what he was convicted of.

The government says that this type of crime -- talking about the statutory rape now -- is one that typically involves risk, that is, one where you have somebody -- somebody that is under the age of 17 and somebody 21 or older who that person's having intercourse with. And that is -- that is just not -- simply not been shown. I mean, I don't believe that this is purposeful, aggressive or violent, but the

government relies on this. Is it typically something that would put a person at the same level of risk and qualitatively the same kind of risk? And they say yes, because 21 and 16, 21 and 15, 28 --

In Chambers, the Supreme Court endorsed the idea of -- at the trial level, and even on appellate level, bringing statistics in to show that this actually is a type of case that involves that type of qualitative and degree of risk. And the government simply hasn't done that. We haven't seen any type of statistical analysis.

THE COURT: Well, maybe the reason they didn't do that is because the Second Circuit has already done it for them.

MR. BARTH: No question. No question.

THE COURT: The Second Circuit has already said that that's already -- that's already established and satisfied, so, why would they necessarily have to go through all of the evidentiary burden of trying to show, you know, whether there's a degree of risk in these kinds of offenses?

MR. BARTH: And I think you're right. I think the government is resting on Daye. But again, I think -- and I won't rehash this -- that Daye is factually distinguishable, and that we have statutory construction arguments that -- that rely on the

guidelines themselves and the differences in the guidelines that support our arguments.

With regard to -- and I am just going in order of the government's comments. With regard to whether these guns were involved in other felony offense, we stand on the arguments of probation, and we believe that in order for this Court to find differently, it would have to engage in speculation. And so we agree with probation on that.

And, finally, with regard to the question of divisibility, I read the Court a quote earlier and I will just give the Court a citation, which is a Second Circuit case, and it's -- the case name is U.S. versus Lanferman, and that's L-A-N-F-E-R-M-A-N. This was an immigration case that employed the categorical analysis. And in it they say, We, quote, have explicitly found statutes divisible only where the removable and nonremovable offenses -- they're talking about whether -- whether something's removable as an aggravated felony or not because it's an immigration case -- they describe, are listed in different subsections or comprise discrete elements of a disjunctive list or proscribed conduct.

And so that -- that type of divisibility analysis has only been -- is the only one that's been used by the

Second Circuit. Now, the Second Circuit has remained quiet or silent on whether any of the other types of analyses that could render a statute divisible can be employed, but up till now they have only used the one I just read to you, or at least as of Lanferman.

Now, if we were in the Ninth Circuit, be a different story. Then the government's analysis would be correct, at least to a degree, but we're not. I cited a number of circuits that agree with my divisibility argument, using this sort of analysis that I just read, and I got that from a late 2011 case, Ninth Circuit, *en banc*. I don't have the cite but it's Aguila-Montes de Oca, which did sort of a quick circuit survey on who's using this divisible-only type of analysis and who is using the broader analysis that the government employs and who has remained silent or ambiguous on the issue. The Second and the Eleventh were the two circuits that remained silent or ambiguous.

THE COURT: All right. Well, this is an issue that I think I need to address, so it means we can't go forward with the completion of the sentencing today. I will issue a written opinion, and we will reschedule the sentencing for a time after the opinion comes out. Okay.

MR. BARTH: At that time I assume my client

will have an opportunity to allocute?

THE COURT: Oh, yes.

MR. BARTH: Thank you, your Honor.

THE COURT: Right. Okay. Thank you.

MS. NOLAN: Thank you.

(Court was in recess at 3:00 p.m.)

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C E R T I F I C A T I O N

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

January 14, 2013
Date

Anne Nichols Pierce